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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 800

BEN W. FORTSON, JR., Individually, and as Secretary of State of Georgia, *Appellant,*

v.

LARRY G. JUSTICE, MRS. A. P. BEALL, MRS. VIRGINIA BUDD, DR. YANCEY F. CARTER, JR., NOBLE F. COLLINS, GLEA GRAY, BRYAN HURST, DR. BENJAMIN E. MAYS, CARL PORTER, CHARLES SLIGH, DR. HERBERT TYLER, and EVERETT WILLIAMS, *Appellees.*

Appeal from the United States District Court for the Northern District of Georgia Atlanta Division

REPLY BRIEF ON BEHALF OF APPELLEES, JUSTICE, et al.

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ARGUMENT

In his brief, the appellant does not dispute the fact, found by the District Court, that Georgia has placed the election of her Governor on a popular basis. Indeed, he could hardly do otherwise since every Governor since 1824 has been elected by the people of Georgia. The main thrust of appellant's argument is

directed to the proposition that the decision of this Court in *Gray* v. *Sanders* "does not require all State officers to be elected by popular vote" (Brief of Appellant, p. 12) and that, therefore, when no clear majority is received by any candidate in the general election, the State is then free to abandon the popular vote method of selection of its Chief Executive and to place the final power of selection in the General Assembly, today malapportioned and having 88.4 per cent of its members pledged to vote for the gubernatorial nominee of their party.

But the question is not, as appellant would seem to suggest, whether Georgia can adopt some method, other than a vote of the people, to select her Chief Executive.[1] The question is rather whether Georgia, having chosen to place all other stages of the general election

[1] Nor is the question whether a state requiring only a plurality for election might provide for selection of its governor by the legislature in the extremely unlikely event of a tie vote. In case of a tie there would be no clear expression of the popular will of the type sufficient to elect the chief executive in such states. Thus, such an election would not present the possibility that the choice made by the greater number of citizens in the general election might be disregarded by the legislature; nor would such an election necessarily involve selection by a legislature which is malapportioned to the degree present in the Georgia General Assembly. The question is highly theoretical since a tie vote in a statewide race for a major office would seem to be practically impossible. If, however, this did occur and we faced, in a state like Illinois (Brief of Appellant, App. D), a situation where among several candidates receiving substantial blocks of votes the two highest were tied, reference of the final selection to the legislature without giving to those who had voted for the minority candidates an opportunity to express a choice between the two highest candidates would certainly be disturbing to many people, and we would not presume here to venture an opinion on the constitutionality of such a reference. In any event this theoretical question is not involved in the present case.

of its Governor on a popular basis, can disregard the will of the people in the final stage of the election and place the selection of the Governor in the General Assembly, in the name of and for the sole purpose of assuring majority rule, which it does not do.

An argument, similar to that made by the State here, was rejected by this Court in the *County Unit* case. Thus, in *Gray* v. *Sanders,* 372 U.S. 368 (1963), it was argued that since the State was not required to nominate candidates for Governor by means of primary elections, but could, and did in fact, permit nominations to be made by party conventions in which the people had no right to equal participation or representation, the Equal Protection Clause could not be violated by the failure to provide equal participation in primary elections. This argument was summarily rejected by this Court, which held that the mere fact that Georgia might authorize the nomination of candidates by other means not involving a vote of the people did not justify discrimination between voters if the State chose to conduct a popular primary. As this Court emphasized:

> But once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded. As we stated in Gomillion v. Lightfoot, supra . . .:
>
> > "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." 372 U.S. at 381.

Whether or not the State might have chosen some other means to select her Governor, it is clear beyond

doubt that Georgia has chosen to fill this vital position by means of an election, in which all qualified citizens of the State are equally entitled to participate. Under these facts there is "no constitutional way by which equality of voting power may be evaded." The clear mandate of the Equal Protection Clause forbids the State from employing at any stage of the election process any means which could weigh the votes of some citizens more heavily than those of others, totally disregard the popular vote, or give, directly or indirectly, to any citizen or group of citizens a greater voice in the selection of their Chief Executive than that given to all other citizens of this State. The provision of the Georgia Constitution which was invalidated by the District Court is the last vestige of the county unit system in this State and the job begun in *Gray* v. *Sanders* will be completed when it has been stricken.

Whatever the extent of disagreement as to the scope of the requirements of the Equal Protection Clause in other cases, the Equal Protection Clause certainly demands at a minimum that such a plan as adopted by Georgia for the selection of its Chief Executive must not permit the systematic frustration of the electorate.[2] For this reason, the provision of the Georgia Constitution sanctioning this result was properly held invalid.

To bolster its argument on constitutionality, the appellant urges in effect that affirmance of the District Court's judgment would leave the State without

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[2] The selection of a state legislature or, appellees submit, its chief executive "*must be such as not to permit the systematic frustration of the will of a majority of the electorate* of the State." *Lucas* v. *Forty-Fourth General Assembly of Colorado*, 337 U.S. 713, 744, 753-54 (1964) (dissenting opinion of Stewart, J.). (Emphasis supplied.)

any effective means of selecting its Chief Executive. This kind of an effort to alarm the Court and deter it from addressing itself to basic constitutional issues involved in State procedures is not an unfamiliar one. *Reynolds* v. *Sims,* 377 U.S. 533, 566 (1964); *Baker* v. *Carr,* 369 U.S. 186, 251, 261-62 (1962) (concurring opinion of Clark, J.). The complete answer to appellant's concern lies in the perfectly clear, all-inclusive provisions of Section 34-1514 providing for a prompt runoff. Appellant argues weakly that this section is not applicable and that, even if it is applicable, the "mechanical complexities" are too great to overcome.[3]

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[3] The appellant asserts that a runoff pursuant to Section 34-1514 of the Election Code would be impossible because the 14-day period prescribed in this Section is "not enough time" within which to hold such a runoff and because one set of the returns in the gubernatorial election remains sealed for transmission to the General Assembly. Ga. Code Ann. § 34-1506(c). Although the requirement that a runoff be held within 14 days was sufficient for the Democratic primary runoff held on September 28 in which more than 800,000 people voted, (R. 141-42, 179), the General Assembly, anticipating the probability of delays in statewide runoff races for Governor, United States Senator, and other public offices as well as in local runoffs, added the words "unless such runoff date is postponed by Court order." Ga. Code Ann. § 34-1514. The District Court has retained jurisdiction "to enter such other and further orders as may be required" (R. 234), and can postpone (*i.e.* put after) the runoff date. The fact that one set of the gubernatorial returns is sealed constitutes no obstacle to a runoff since certified copies of such returns are maintained as public records in the office of each ordinary. Ga. Code Ann. §§ 34-1506(a), 34-403. This information is, therefore, readily accessible to the Secretary of State, who has the duty of advising the ordinaries of what to put on the ballot in *all* statewide runoffs (Ga. Code Ann. § 34-301; *cf.* § 34-401 on coordinate responsibilities of ordinaries), *i.e.*, the names of the two persons "eligible to compete with each other in a runoff primary or election" (Ga. Code Ann. § 34-1704(a)) who are "the two candidates receiving the highest number of votes" (Ga. Code Ann. § 34-1514) in the general election.

His argument magnifies questions that would ordinarily present no significant problem to the Secretary of State and the Attorney General. As soon as the appellant is given the clear and final direction that the invalid provisions for reference to the legislature cannot be followed and is advised that it is his duty to follow the provisions of the Georgia Election Code regarding runoffs, this particular disturbance in Georgia's governmental life can be resolved with promptness, dignity and certainty.

Respectfully submitted,

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